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No. 94-1698

IN THE

SUPREME COURT OF THE UNITED STATES

DORA SCHRIRO, et al.,

Petitioners,

v.

JOE D. HEATON, et al.,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY MEMORANDUM

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON*
Appellate Counsel

JOHN R. MUNICH
Chief Counsel
Litigation Division

BRUCE FARMER
MICHAEL E. PRITCHETT
Assistant Attorneys General

Post Office Box 899
Jefferson City, Missouri 65102
Phone: (314) 751-3321

Attorneys for Petitioners

*Counsel of Record

15pp

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

REPLY TO RESPONDENTS' REASONS FOR DENYING THE WRIT

The respondents are determined to ignore the unique position of states in our federal system. They do not

suggest that the question presented is not an important one. *See* Opp. at 5. They instead premise their argument on the sophistry that the Missouri Department of Corrections is undertaking "a desperate effort to avoid the duties the [Fair Labor Standards Act] imposes on all employers." Opp. at 19. But Congress, in the Fair Labor Standards Amendments of 1985, granted state and local governments a tool forbidden to most other employers. The issue here, which is purely a question of law, is whether Congress did so in a fashion that allows employees to partially negate the benefits Congress expressly conferred. Because the answer to that question is of critical importance to governmental employers across the United States, this Court should provide the answer.

I. This Case Presents A Significant Issue Of Law Regarding The Construction Of An Important Statute

As the respondents point out, Congress extended the FLSA to "millions of public employees." Opp. at 10. In response to this Court's subsequent reinterpretation of Tenth Amendment protections in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), however, Congress quickly enacted legislation permitting governmental employers to conserve precious public funds by using compensatory time, rather than cash, to pay their employees for overtime. The respondents concede, as they must, that this case presents "an issue of first impression with respect to an important federal statute." Opp. at 5.

Congress enacted the 1985 FLSA amendments to address the financial concerns of state and local governments. *Moreau v. Klevenhagen*, ____ U.S. ____, 113 S. Ct. 1905, 1908 (1993). The financial realities of operating governmental agencies have long been reflected

in policies that permitted the use of compensatory time in lieu of cash overtime -- and that required the use of that compensatory time within a reasonable period after it was accrued. Such a policy was challenged in *City of Cuyahoga Falls v. Ashcraft*, 1991 WL 284188 (Ohio Ct. App. 9th Dist., Dec. 26, 1991). The court there upheld a requirement that compensatory time be used within 180 days. The court explained the need for such a policy, using terms that are applicable to all state and local governmental agencies. The court recognized that "the City must operate within an annual budget." *Id.* at *1. Requiring the timely use of compensatory time "advances sound fiscal principles." *Id.* Most critical to the Department, it will "prevent a build-up of time off which may, eventually, cause personnel shortages." *Id.*

The issue presented here actually or potentially affects the employers of the vast majority of the "millions of public employees" (Opp. at 10) whose inclusion under the FLSA is not at issue here. Whether a public employer may establish a policy regarding mandatory use of compensatory time was only one of many individual factual and legal issues presented to the district court by the respondents' complaint. The petitioners did not argue that point to the near exclusion of other questions, as the respondents now seem to advise with their perfect hindsight. But that does not change the fact that defining the rights of state and local government employees under 29 U.S.C. § 207(o) is an important question with far-reaching impacts.

II. The Alleged Inadequacies In The Record Of This Case Do Not Affect This Court's Ability To Decide The Important Legal Question Presented

Much of the opposition is dedicated to a claim that the record is not sufficient to form the basis for review by this Court. The petitioners could take issue with each of the respondents' specific criticisms. But it is more important to recognize that the respondents' concern is misplaced. The question here is purely a matter of law, clearly presented by the decisions of both the district court and the court of appeals. For example, the respondents feign concern with the absence of specific evidence about the financial impact that the district court's ruling will have on the Department of Corrections. Opp. at 6. But the holding of the court of appeals was rendered without regard for whether its ruling would have such an impact. And that is precisely the problem. The court decided that state employees have a unilateral right to forever "bank" compensatory time regardless of any burdens on their employers.

Elsewhere, the respondents expressly concede a material point, "that the Respondents have agreed to the compensatory time system as a matter of law." Opp. at 7. The respondents nonetheless quibble over the petitioners' language in making that point, suggesting that there is a factual question not yet resolved and criticizing the content of the papers new corrections officers sign before beginning work. *Id.* But that argument, too, is not material here. The problems the respondents allege are situational ones. If they exist at all, they can be remedied with regard to future hires. But the error of law made by the district court and affirmed by the court of appeals is universal.

The respondents attempt to demean the important interests at issue by expressing misplaced skepticism concerning the nature of Missouri's prison population. True, the petitioners did not add to the district court record evidence that Missouri penitentiaries house felons, including many who are violent and dangerous. *See* Opp. at 10. But by state law, felons are assigned to the custody of the Department of Corrections. Mo. Rev. Stat. § 558.011 (1994). Those convicted of misdemeanors are held in county jails. *Id.* The facilities that employ the respondent corrections officers are those that necessarily house the most violent of those convicted in Missouri courts.

The respondents also demand too much of the district court record when they criticize the petitioners for not presenting evidence of the widespread impact of the court of appeals decision. They are right in one respect: that the record below does not contain "evidence [that] . . . 'other Missouri state agencies, and other agencies in other states, counties, and municipalities have instituted policies of overtime control to keep compensatory time balances at a minimum.'" Opp. at 6. Such evidence would have been entirely out of place. The practices of other agencies and other jurisdictions were not at issue below. But those practices are directly pertinent to the question of whether this Court should review the court of appeals decision.

This Court does not need a detailed factual record in order to find that the rule announced by the court of appeals will have far-reaching effects. Numerous judicial decisions have recognized that preclude employees from having complete control over the their compensatory time. Among them are *American Federation of State, County and Municipal Employees, Council 17 v. State of Louisiana*, 1 Wage & Hour Cas.2d (BNA) 1541, 1994 WL 86679 (E.D. La. March 4, 1994), discussed in the Petition at pages 25 and 26, and *City of Cuyahoga Falls v. Ashcraft*, *supra*. In

Cuyahoga Falls, the court upheld a requirement that compensatory time be used within 180 days. Similarly, the policy at issue in *Commissioners Court v. Ross*, 809 S.W.2d 754, 755 (Tex. Ct. App.-Tyler 1991), required that compensatory time earned in one week be taken during the next.

Many states have regulations that either directly affect the use of compensatory time, or authorize individual agencies to create policies that are inconsistent with the Eighth Circuit decision. For example, Illinois regulations require in some instances that employees must say within one week of accruing compensatory time when they will use that time. Ill. Admin. Code § 310.100. Illinois, Kansas and Nevada require that the leave be taken within a reasonable period of time after accrual. Ill. Admin. Code § 303.320; Kan. Admin. Regs. § 1-5-24; Nev. Admin. Code § 284-250. Other state regulations that impose a specific deadline for using the compensatory time. For example, an Indiana regulation requires the time to be used within the quarter in which it is earned. Ind. Admin. Code § 2-11-2. Like the municipal policy discussed in *City of Cuyahoga*, the State of Ohio has a regulation requiring use within 180 days. Ohio Admin. Code § 123:1-43-05. And a Washington regulation permits agencies to require that compensatory leave be scheduled "as soon as possible" after it is accrued. Wash. Admin. Code § 356-14-260.

Other state regulations, like that at issue in the Louisiana case, require the use of compensatory time before using other forms of leave. *See* Ohio Admin. Code § 123:1-43-05 (compensatory time must be used before any leave of absence may be granted); Wash. Admin. Code § 251-22-117 (for a "child care emergency," compensatory time must be used before other forms of leave may be used), and § 356-14-260 (agencies may require that compensatory time be liquidated before annual leave may

be taken). The court of appeals' ruling would preclude employers from establishing such priorities. Broadly read, it might even preclude Utah's instruction that supervisors "encourage" the use of compensatory time within 30 days. Utah Admin. R. § 477-8-2(6).

State regulations are only the tip of the iceberg. Many individual state and local agencies have the authority to create their own policies regarding compensatory time. *See, e.g., Commissioners Court v. Ross*, 809 S.W.2d at 755. There is no national compilation of such local policies. But each local governmental agency shares the characteristics of the City of Cuyahoga: a need to properly manage both financial and human resources paid for by the taxpayer. It is not enough to blithely assert, as do the respondents, that the Department and other agencies can "hire[] more employees, and thereby diminish[] the necessity for overtime." Opp. at 18 n. 11. Perhaps increased employment was an objective of the FLSA. But even assuming that were practical and advisable in the government context, the 1985 Amendments had a quite different purpose. *See* Moreau, 113 S.Ct. at 1908; Petition at 20-21.

The Missouri Department of Corrections is merely one of many state and local agencies attempting to make fair use of the authority that Congress gave in the Fair Labor Standards Amendments of 1985. If the Department is at all distinctive, it is because of its important public safety role. The ability of the Department and other government agencies to manage their financial and human resources in a fashion that is consistent with the intent of the 1985 Amendments, with the states' role as recognized in the Tenth Amendment, and with the obvious security needs of a correctional institution, is an important question of law that merits consideration by this Court.

III. This Court Has Rejected The Premise That The FLSA Must Always Be Read To Favor Employees

The respondents correctly cite the language of *Moreau v. Klevenhagen*, 113 S. Ct. 1905. But they ignore the context and actual rationale of that case, the origin of the language on which they rely, and this Court's recent emphasis on recognizing the role of the states as opposed to the authority of Congress.

The declaration in *Moreau* that exemptions to the FLSA must be narrowly construed was derived from cases interpreting the FLSA's retail sales exemption. *E.g.*, *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960), *citing Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 294 (1959), *in turn citing Phillips v. Walling*, 324 U.S. 490, 493 (1945). In each of those cases, the question was not how to interpret a specific application of the FLSA, but whether a group of employers fell within the scope of the FLSA at all. Coverage is not an issue here; the Department is covered by the FLSA, and its employees are entitled to FLSA protection. The only question presented is one of application: does that protection include the right to defeat the states' ability to use compensatory time? Other than the Eighth Circuit and the Louisiana court, no court has even addressed that question, much less applied to it a rule of construction that arose in an entirely different context.

Unlike *Ben Kanowsky* and its predecessors, the case before the Court in *Moreau* arose under 29 U.S.C. § 207(o). But the question before the Court was still one of coverage, *i.e.*, whether the employees were covered by § 207(o). Perhaps it would have been appropriate there to apply the principle endorsed in *Ben Kanowsky* to the context of another coverage question. But that does not mean that the same principle should be applied where the question is not

coverage at all. Moreover, although this Court cited the principle of pro-employee construction in *Moreau*, it did not apply it. Rather, the Court rejected an argument that the statute was to always be read in favor of the employee. Instead, the Court adopted the "most plausible reading" of the law. 113 S. Ct. at 1911.

To argue that the FLSA must always be construed in favor of employees is to urge a position that this Court has never endorsed. Certainly the 1985 Amendment statute must be construed so as to effectuate its legislative purpose. And that construction must take into account the concerns that are inherent whenever Congress imposes financial burdens on the sovereign states. This Court has recently and adamantly spoken concerning the limits on congressional authority and the role of the states. *Eg. United States v. Lopez*, 63 U.S.L.W. 4343 (1995). At a minimum, under those decisions, the lower courts must be reminded that they cannot use distinguishable principals of construction to deprive the states of an essential part of the flexibility Congress gave them.

IV. The Louisiana Decision Presages The Difficulties Presented By The Statutory Interpretation Adopted By The 8th Circuit As It Is Imposed On The States

The respondents would ascribe no significance to the recent conflicting decision by the United States District Court for the Eastern District of Louisiana. But this Court has often given weight to district court decisions that conflict with those of courts of appeals. *See. e.g., Calhoun v. Harvey*, 379 U.S. 134, 137 & n. 10 (1964); *Massachusetts v. United States*, 435 U.S. 444, 453 (1978); *United States v. Constantine*, 296 U.S. 287, 290 (1935). In each instance, the district court decision was evidence of

the importance of the issue and the need for the kind of final, uniform resolution that only this Court can provide.

The decision in *American Federation of State, County and Municipal Employees, Council 17 v. State of Louisiana* fits that mold. Congress amended the FLSA in 1985. State and local governments then adopted statutes, regulations, and policies to implement that law. Employees then began to accrue a considerable amount of compensatory time under the policies. This case and the Louisiana case demonstrate that those circumstances have now been fulfilled -- and that the courts are diverging on how to resolve the issue. This issue will arise repeatedly as more employees approach the 240 and 480 hour ceilings. As word of the Eighth Circuit decision spreads, more government employees will decide to accrue large amounts of compensatory time. The only way to prevent an explosion of litigation on this issue in the federal and state courts[1] is to have this Court address the question now.

CONCLUSION

This Court should grant the writ of certiorari and review the important legal issue presented in the petition.

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[1] FLSA issues are often litigated in state court. E.g., Casserly v. State, 844 P.2d 1225 (Colo. App. 1992); Madera Police Officers Ass'n v. City of Madera, 682 P.2d 1087 (Cal. 1984); Weeks v. Chief of Washington State Patrol, 639 P.2d 732 (Wash. 1982).

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON*
Appellate Counsel

JOHN R. MUNICH
Chief Counsel
Litigation Division

BRUCE FARMER
MICHAEL PRITCHETT
Assistant Attorneys General

Counsel for Petitioners

**Counsel of Record*